4-1-2006

The Rhetoric of Necessity (Or, Sanford Levinson's Pinteresque Conversation)

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Len: Do you believe in God?
Mark: What?
Len: Do you believe in God?
Mark: Who?
Len: God.
Mark: God?
Len: Do you believe in God?
Mark: Do I believe in God?
Len: Yes.
Mark: Would you say that again?
Len: Have a biscuit.[1]

It may seem odd to begin a discussion of whether the President should have the power to act extraconstitutionally in times of necessity with a quote from *The Dwarves*. As I researched this Comment, though, I could not escape the uneasy feeling that I was witnessing what could only be described as a Pinteresque conversation—a conversation in which Professor Levinson and his interlocutors, "while exchanging remarks apparently on a common topic, and using mutually comprehensible vocabulary, are revealed as experiencing a profound failure to communicate with one another."[2] Professor Levinson wants to find a workable balance between constitutional restraints and presidential power, one that would give future Presidents the ability to protect legitimate national security interests without allowing them to become, like Bush the Younger, latter-day Caesars. His interlocutors, by contrast, are not interested in discussing restraints on presidential power, constitutional or otherwise; for them, the creation of an imperial presidency is the *goal*, not the *problem*, of constitutional theory.

My own political and legal sympathies lie with Professor Levinson, and I find his analysis of the Bush Administration's "near-dictatorial conception of presidential power"[3] to be insightful and compelling. I am puzzled, though, by his admission that he finds it

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[1] Harold Pinter, *The Dwarves*, *in* 2 COLLECTED WORKS OF HAROLD PINTER 111 (1977).

[2] Andrew Wyllie, *Harold Pinter*, *in* THE LITERARY ENCYCLOPEDIA, http://www.litencyc.com/php/speople.php?rec=true&UID=4985 (last visited Feb. 10, 2006).

[3] Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 706 (2006).

difficult to identify "an adequate leverage point from which to criticize the Bush Administration without, at the same time, calling into question most of America's 'great' presidents."[4] As Professor Levinson ably demonstrates, Bush is by no means the first President to insist that he has the authority to ignore the Constitution when he feels it necessary.[5] But that does not mean all extraconstitutional action is created equal—that if we approve one such action, we are committed to approving all of them. On the contrary, it seems to me that we can distinguish between Bush's authorization of torture and Lincoln's suspension of habeas corpus by embracing a rule—widely accepted by the Framers, by our greatest Presidents, and by numerous scholars—that Presidents have the inherent authority to disregard constitutional restraints only when, to quote Clinton Rossiter, "it is necessary or even indispensable to the preservation of the state and its constitutional order."[6]

Admittedly, even such a narrow definition of necessity might invalidate some of Professor Levinson's "happy endings."[7] But it would also invalidate many extraconstitutional actions that were far less felicitous, such as the internment of Japanese-Americans during the Second World War, and prevent similar abuses of presidential power in the future. On balance, therefore, I believe that the *ex ante* benefits of applying such a rule would be greater than its *ex post* costs.

I will defend both of these claims in this Comment. Whether Professor Levinson will agree with them remains to be seen, but he is not the object of my criticism. My quarrel is with those theorists—Michael Stokes Paulsen and Oren Gross in particular—who not only defend the imperial presidency and executive power by diluting the concept of necessity, but also attempt to obscure the antidemocratic implications of their theories by invoking the ghosts

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[4] *Id.* at 739 n.141.

[5] *Id.* at 736.

[6] CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 298 (1948).

[7] Levinson, *supra* note 3, at 704.

of great Presidents like Lincoln, as if the Nixons of American history simply did not exist.[8]

I. THE CONCEPT OF NECESSITY

As Professor Levinson reminds us, Presidents have acted extraconstitutionally since the founding of the republic. Jefferson's Louisiana Purchase;[9] Lincoln's suspension of habeas corpus[10] and Emancipation Proclamation;[11] Roosevelt's internment of Japanese-Americans[12] and lend-lease program;[13] Truman's attempt to seize the steel mills;[14] Clinton's bombing of the Balkans[15]—all at least arguably violated the literal provisions of the Constitution.

Both in "Constitutional Norms" and in other works,[16] Professor Levinson scrupulously avoids passing judgment on the propriety of those actions. It is clear, though, that however legally problematic he may find *specific* extraconstitutional presidential actions—in particular, the Bush Administration's decision to authorize torture and extraordinary renditions, despite the U.S.'s international obligations under the UN Torture Convention[17]—he is not willing to condemn such action as illegitimate *in principle*. Consider what he says about Madison's claim that the Bank of the United States was unconstitutional: "[Madison] told his colleagues, 'where the meaning is clear, the consequences, whatever they may be, are to be admitted. . . .' One might ungenerously translate this as 'Follow the text though the heavens – or constitutional order – fall,' which, of course, is a lunatic notion."[18]

I am less certain than Professor Levinson that it is "lunatic" to insist extraconstitutional action is never justified, whatever the

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[8] *See infra* notes 39-67 and accompanying text.
[9] Levinson, *supra* note 3, at 736.
[10] *Id.* at 716-17.
[11] *Id.* at 701.
[12] *Id.* at 735.
[13] *Id.* at 736.
[14] *Id.* at 735.
[15] *Id.* at 740.
[16] *See generally* Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135 (2001).
[17] Levinson, *supra* note 3, at 741-42.
[18] *Id.* at 729.

consequences; Saikrishna Prakash's argument to the contrary in *The Constitution as Suicide Pact*[19] is very persuasive. Regardless, the quote indicates that Professor Levinson believes that there are—at least in theory—situations in which a President can legitimately ignore the text of the Constitution. The question is: When? What kind of necessity authorizes a President to act extraconstitutionally?

Unfortunately, Professor Levinson never specifically tells us. The most we get are statements that "the central issue" is "our willingness . . . to accept the presence of 'emergencies' as a justification for deviation from ordinary constitutional norms,"[20] and suggestive but unanswered questions like "[d]o national security interests—including, of course, preservation of the basic constitutional order at all—count as sufficiently moral concerns to trump what might otherwise be regarded as the clear meaning . . . of the law?"[21]

At first, I was surprised that Professor Levinson does not offer us his sense, however provisional or contestable, of what kinds of crises justify extraconstitutional action. After all, he ends his essay with an impassioned plea for an "adult conversation" about that very issue.[22] But I now believe that the omission is almost certainly deliberate, designed to force us to think about, in his words, our "fundamental political visions for the collective enterprise in self-government we call the United States of America."[23] If Professor Levinson is correct—and I think he is—that the proper balance between presidential power and constitutional restraints is ultimately not a legal question but a (high) political one,[24] deferring to the wisdom of constitutional scholars is no better than deferring to the wisdom of the President himself. Renouncing our faith in the Constitution is no less an existential act than choosing to worship it in the first place.

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[19] *See generally* Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004) (questioning Paulsen's argument and arguing that Constitution does not give President power to suspend constitutional protections to save nation).

[20] Levinson, *supra* note 3, at 735.

[21] *Id.* at 701.

[22] *Id.* at 748-51.

[23] *Id.* at 750.

[24] *Id.*

Professor Levinson's unwillingness to define necessity, though, comes at a price. First, it helps explain why he struggles to find a leverage point from which he can criticize Bush without undermining the legacy of "great" Presidents like Lincoln. If all presidential invocations of necessity are alike—or, more accurately, if necessity is what the President says it is—then any distinction between the two will necessarily be low politics, "making decisions by reference to the immediate consequences for one's own partisan interests,"[25] rather than high.

Second, it permits constitutional scholars who are more interested in maximizing presidential power than protecting individual rights to monopolize the rhetorical field. As I will show, scholars like Paulsen purport to apply a carefully delimited definition of necessity, but then progressively dilute that definition until it becomes nothing more than a trope that Presidents can use to justify their partisan political agendas.

A. THE SURVIVAL RULE

Is it possible to articulate a coherent definition of necessity that can distinguish between "legitimate" and "illegitimate" extraconstitutional actions?[26] One candidate, mentioned earlier, immediately suggests itself: necessity refers to a situation in which the President cannot preserve the constitutional order unless he acts extraconstitutionally. Whatever their differences, the Framers, our greatest Presidents, and numerous constitutional scholars seem to agree that, at a minimum, extraconstitutional action is justified in such dire situations. Professor Levinson describes Madison's injunction, "[f]ollow the text though the . . . constitutional order . . . falls," as a lunatic notion—perhaps tipping his hand a bit—and then quickly notes that Madison himself prefaced his injunction with the caveat that "[a]n interpretation that destroys the very characteristic of the Government cannot be just."[27] Jefferson insisted that "[t]he

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[25] *Id.*

[26] I am not claiming that it is possible to "objectively" distinguish between the two. The distinction—like all distinctions—is produced by a definition of necessity that reflects my own "fundamental political vision," one that is always already contestable.

[27] Levinson, *supra* note 3, at 729 (quoting PAUL BREST ET AL., PROCESSES OF CONSTITU-

laws of necessity, of self-preservation, of saving our country when in danger"—note the grammatical parallelism—"are of higher obligation" than "strict observance of the written law."[28] Lincoln defended his suspension of habeas corpus by stressing the need to prevent the "government itself" from being destroyed.[29] Rossiter says the "first and great commandment of constitutional dictatorship" is that, as quoted earlier, extraconstitutional action is impermissible "unless it is necessary or even indispensable to the preservation of the state and its constitutional order."[30] And even Carl Schmitt, no great friend of democracy, says that "the exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like."[31]

As with all such general definitions, of course, the devil is in the details. There will inevitably be disagreements about whether a particular situation threatens the constitutional order. Nevertheless, no other definition of necessity—what I will call the "survival rule"—is capable of winning such broad assent, if only because it is the lowest common denominator for those who believe extraconstitutional action is sometimes justified. (After all, how often might Professor Levinson and Carl Schmitt agree about the nature of executive power? Strange bedfellows, indeed.) Moreover, the survival rule seems far easier to apply than any rule that is more permissive: We are far more likely to agree, for example, about what qualifies as a threat to the constitutional order than

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TIONAL DECISIONMAKING 9 (4th ed. 2000)); *cf.* THE FEDERALIST NO. 41, at 253 (James Madison) (Clinton Rossiter ed., 1961) ("It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.")

[28] Letter from Thomas Jefferson to John Calvin (Sept. 20, 1810), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 606, 606 (Adrienne Koch & William Peden eds., 1944).

[29] Abraham Lincoln, Message to Congress in Special Session, *in* THE PORTABLE ABRAHAM LINCOLN 209, 216 (Andrew Delbanco ed., 1992).

[30] ROSSITER, *supra* note 6, at 298.

[31] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 6 (George Schwab trans., MIT Press 1985).

what qualifies, to quote George Mason, as a "season of public danger."[32]

If we accept the survival rule, it becomes possible to distinguish between extraconstitutional actions like Lincoln's suspension of habeas corpus and Bush's authorization of torture. Lincoln was faced with a Civil War that threatened the very existence of the United States; it was that calamitous possibility that led him to take the actions that "form history's most illustrious precedent for constitutional dictatorship."[33] We may, with the benefit of hindsight, wonder whether some of Lincoln's more authoritarian actions were indispensable to preserving the Union.[34] Such skepticism is salutary because it prevents us from overestimating in hindsight the benefits of Lincoln taking on the role of constitutional dictator. Still, it is difficult to argue that the situation did not qualify as one that threatened the constitutional order itself; as Rossiter says, "No threat to the continued existence of a nation and its government is so exacting . . . as the crisis of civil war."[35]

The same cannot be said of the events of September 11, 2001, no matter how terrible or unjustified the attacks on the Twin Towers and Pentagon might have been. Even if al Qaeda had somehow managed to strike both the White House and Congress, the constitutional order would have survived: the federal courts would have remained open, Congress would have reconstituted itself, and the presidency would have passed in the order provided for by the Succession Clause[36] and the succession statute.[37] Nor is it possible to "bootstrap" 9/11 into a threat to the constitutional order by somehow concatenating potential al Qaeda attacks into one big frontal assault. As Bruce Ackerman has pointed out, even the best

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[32] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 648-49 (Max Farrand ed., rev. ed. 1966).

[33] ROSSITER, *supra* note 6, at 239.

[34] *See id.* at 224 (examining "The Lincoln Dictatorship"); *cf.* Prakash, *supra* note 19, at 1305 (noting that instead of acting extraconstitutionally, Lincoln could have preserved constitutional order by allowing South to secede).

[35] ROSSITER, *supra* note 6, at 223.

[36] U.S. CONST. art. II, § 1, cl. 6.

[37] 3 U.S.C. § 19(a)(1) (1994). Note, though, that the Amars have famously questioned the constitutionality of the statute. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

organized terrorist groups do not pose an existential threat to the U.S.:

> If the Cold War threat of nuclear annihilation had been realized, it would have meant the end of civilization as we know it. The survivors would have been obliged to build a legitimate government from the ground up. This will not be true in the new age of terrorism. It may only be a matter of time before a suitcase A-bomb obliterates a major American city, but there will be nothing like a Soviet-style rocket assault leading to the destruction of all major cities simultaneously. Despite the horror, the death, and the pain, American government will survive the day after the tragedy.[38]

Because 9/11 and al Qaeda did not pose a threat to the constitutional order itself, the survival rule cannot justify Bush's authorization of torture and extraordinary renditions. However laudable the Bush Administration's ends might be—and, like Professor Levinson, I have my doubts about that—there was simply no justification for pursuing them through extraconstitutional means.

B. DISTORTING NECESSITY

Michael Paulsen, of course, disagrees. Although he does not deal with extraordinary renditions, he claims that, in the right circumstances, "principles of constitutional necessity" can justify torture.[39] Moreover, he believes that the Bush Administration's peremptory detention of "enemy combatants" and establishment of military tribunals to try them are justified even if the "better interpretation" of the Constitution prohibits them.[40]

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[38] Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1036-37 (2004).

[39] Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1280 (2004).

[40] *Id.* at 1275-76. Paulsen discusses combatants and tribunals in the section of his essay that deals with necessity as a "rule of construction." *Id.* at 1268. That discussion, however, is superfluous, because he openly admits that

> where such an alternative saving construction is *not* possible, the necessity of preserving the Constitution and the constitutional order as a

My point here is not to take issue with the legal or normative merits of Paulsen's claims. At least he does not argue--like John Yoo[41]—that the Bush Administration's more authoritarian actions are fully consistent with the text of the Constitution.[42] What I find most problematic about Paulsen's argument is the skillful way he dilutes the survival rule while at the same time claiming to embrace it. Consider, for example, the essay's opening paragraph: "My proposition is a simple but dramatic one: The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements."[43]

Despite its provocative language, this paragraph simply restates the survival rule. In Paulsen's view, the government—we learn later that this means the President, first and quite literally foremost[44]—has the inherent power to act extraconstitutionally in times of "extraordinary necessity," understood as situations that threaten the "overriding principle of constitutional and national self-preservation."[45] Similar language recurs throughout the early pages of the essay: "the Presidential Oath Clause creates a presidential *duty* to preserve the constitutional order of the United States";[46] "the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results";[47] "[t]he theory is . . . that permitting a nation-destroying outcome is permitting a Constitution-destroying outcome, and that to allow such an outcome

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> whole requires that priority be given to the preservation of the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, even at the expense of specific constitutional provisions.

Id. at 1257-58.

[41] *See* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1222 (2004) (stating President's ability to handle enemy personnel as he chooses has long been accepted).

[42] *See, e.g.*, Paulsen, *supra* note 39, at 1275 (noting, with regard to military tribunals, that "[t]he text of the constitutional provisions at issue would seem, albeit not clearly, to exclude the use of such tribunals and procedures to dispense justice").

[43] *Id.* at 1257.

[44] *See id.* at 1262-63 (arguing that President is ultimate arbiter of Constitution).

[45] *Id.* at 1257.

[46] *Id.* at 1258.

[47] *Id.* at 1268.

would violate the President's sworn duty to preserve the Constitution."[48]

So far, so good. But then Paulsen begins to consider *specific applications* of the survival rule. And the rule begins to change.

Consider, first, his discussion of a potential nuclear strike on the U.S. He asks us to imagine a situation in which a nation—Iraq?—believed to possess the means and the will to use nuclear weapons against the U.S. "is either developing or in the process of developing the capability of delivering such weapons, or . . . may well be inclined to convey such weapons to persons possessing such capability."[49] Paulsen believes that the "rule of necessity" would authorize the President to launch a pre-emptive strike against that nation, even though he admits that "the better understanding of the Constitution's allocation of war powers is that Congress, not the President, has the power to take the nation to war by initiating offensive military hostilities against a foreign sovereign power."[50]

Such extraconstitutional action is difficult, if not impossible, to reconcile with the survival rule. As Ackerman notes, although a terrorist group in possession of one or more nuclear weapons could do great damage to the U.S., it could not threaten the nation's existence or its constitutional order.[51] And indeed, Paulsen's formulation of the survival rule now subtly shifts: Whereas before he invoked "constitutional and national survival" to justify extraconstitutional action, he now justifies the President's pre-emptive attack on the ground that the President could rationally believe that "the dangers of inaction are potentially catastrophic to the survival of the nation *or millions of its people*."[52]

Nor is that Paulsen's only dilution of the survival rule. A few paragraphs later, he argues that the President has the authority to detain individuals he deems to be "enemy combatants" in times of necessity, "even when the alternative construction might, absent the

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[48] *Id.* at 1269.
[49] *Id.* at 1272.
[50] *Id.*
[51] Ackerman, *supra* note 38, at 1036-37.
[52] Paulsen, *supra* note 39, at 1272 (emphasis added).

danger, be on balance the preferable one."[53] And what, exactly, is the danger that justifies adopting the non-preferable alternative? "[T]he prospect of *grave risk or danger to the nation.*"[54] This amorphous standard is clearly less demanding than "constitutional or national survival"—or even, for that matter, the murder of "millions" of people—and seems to be produced not by "inference and deduction" from the President's oath,[55] but by the desire to rationalize the Bush Administration's political agenda.

Paulsen's final dilution of the survival rule comes in his defense of military tribunals. He suggests that such tribunals are justified, despite the fact that the text of the Constitution points in the opposite direction, because "the Constitution's provisions should be construed to avoid *tendencies toward self-destruction.*"[56] Paulsen never explains what tendency toward self-destruction would be encouraged by requiring members of al Qaeda to be tried in civilian courts, nor does he attempt to explain the reach of his general rule. But it is clear that the rule is the least demanding of all the "rules of necessity" he mentions in his essay.

In less than five law review pages, then, the President's extraconstitutional authority expands from situations that pose a threat to "constitutional and national survival" to those that involve "tendencies toward self-destruction." The difference cannot be overstated: Whereas the survival rule is narrow and limiting, because the U.S. faces few genuinely existential threats in the post-atomic age, the "tendency" rule is broad and empowering, because there is always *some* self-destructive tendency that a President can

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[53] *Id.* at 1275. Paulsen is clearly talking about the Bush Administration here and regarding the detention of enemy combatants, but he never specifically mentions it.

[54] *Id.* (emphasis added).

[55] *Id.* at 1289. The paragraph from which these quotes are taken is fascinating. In it, Paulsen admits that his "contention is not that the 'Constitution of Necessity' was specifically intended by the Framers, but that it is a logical consequence of the provisions they wrote and the system that they created—and that this, rather than subjective intentions or expectations, is what counts." *Id.* If there is anything originalist about this method of interpretation, I fail to see it—a very strange position for a self-proclaimed adherent to originalism (though by far the most creative and interesting one). *See generally* Michael Stokes Paulsen, *Lawson's Awesome (Also Wrong, Some)*, 18 CONST. COMMENT. 231 (2001) (responding to Professor Lawson's attack on Paulsen's argument). In fact, substitute "right to privacy" for "rule of necessity," and the argument looks disturbingly familiar.

[56] Paulsen, *supra* 39, at 1276 (emphasis added).

argue will be exacerbated by fidelity to the Constitution. The indefinite detention of enemy combatants is a case in point: Although there is little evidence to suggest that the unconstitutional policy has made the U.S. more secure,[57] Bush's ritual invocation of 9/11 and the perils of an unchecked al Qaeda have managed to neutralize anything other than token congressional or judicial opposition.

The fact that Paulsen defends an extremely broad rule of necessity, of course, is not reason enough to criticize him. I may disagree with his views, but they are skillfully presented and clearly have a place in Professor Levinson's "adult dialogue" about the balance between presidential power and constitutional restraints. It seems clear, however, that Paulsen is less interested in engaging in conversation than he is in rationalizing a near-dictatorial conception of the presidency. How else can we interpret his decision to dilute the survival rule while claiming at the same time to embrace it?

To be fair, Paulsen is not the only constitutional scholar who makes this rhetorical move. An even more dramatic example is Oren Gross's "Extra-Legal Measures model," according to which

> public officials . . . may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions. It is then up to the people to decide, either directly or indirectly (e.g., through their elected representatives in the legislature), how to respond to such actions. The people may decide to hold the actor to the wrongfulness of her actions, demonstrating commitment to the violated principles and values. The acting official may be called to answer, and make legal and political

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[57] The Bush Administration's two-year detention of Yaser Esam Hamdi is a case in point. *See* Dahlia Lithwick, *Nevermind, Hamdi Wasn't So Bad After All*, SLATE, Sept. 23, 2004, http://slate.msn.com/id/2107114/ (detailing lengthy detention of Hamdi and sudden release by Administration). After Hamdi challenged his designation as an enemy combatant and the Supreme Court held that he was entitled to some sort of a hearing on his status, the Administration promptly released him and sent him back to Saudi Arabia. *Id.*

> reparations, for her actions. Alternatively, the people may act to approve, ex post, the extralegal actions of the public official.[58]

Although Gross claims that the Extra-Legal Measures model is designed for truly extraordinary occasions, he never engages in a sustained discussion of what occasions may qualify. Still, his essay is replete with language that suggests allegiance to the survival rule: "[w]hile going outside the legal order may be a 'little wrong,' it is advocated here in order to facilitate the attainment of a 'great right,' namely the preservation not only of the constitutional order, but also of its most fundamental principles and tenets";[59] "[t]he government's ability to act swiftly, secretly, and decisively against a threat to the life of the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights";[60] "[t]he notion of *raison d'état* privileges the exercise of a wide panoply of measures by the state faced with challenges to its very existence."[61]

Gross's invocation of the survival rule, though, is merely rhetorical. In practice, he applies a rule that is far less restrictive. Consider, for example, his discussion of a situation in which the police have apprehended someone they are certain has planted a massive bomb that threatens to kill "thousands" of people in a shopping mall.[62] If the police are equally certain that the suspect will not reveal the location of the bomb before it goes off unless he is tortured, are the police justified in torturing him? Gross says the answer is yes, even though this "extreme case" hardly threatens the existence of the constitutional order itself.[63] In fact, now that he is dealing with a specific emergency situation, he no longer pretends that the survival rule applies—he now says that, as long as the general public is willing to ratify it, extralegal action is justified

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[58] Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003).

[59] *Id.* at 1024.

[60] *Id.*

[61] *Id.* at 1030.

[62] *Id.* at 1097-98.

[63] *Id.* at 1099.

whenever it will "promote the greatest good for the greatest number of people."[64]

Gross, in short, reduces the obligation of government officials—nearly always part of the executive[65]—to follow the Constitution to a simple utilitarian calculus.[66] Indeed, that utilitarian calculus *does not even have to be correct*: According to Gross, extralegal action is appropriate as long as is it "*aimed* at the advancement of the public good."[67] In other words, the Extra-Legal Measures model does not categorically prohibit executive officials from violating the Constitution even when their actions do not, in fact, "promote the greatest good for the greatest number of people";[68] as long as the public is willing to ratify the official's failure, he is immune from punishment, no matter how egregious his miscalculation or how base his motives.[69]

Needless to say, I am not persuaded by Gross's model. As with Paulsen's "rule of necessity," though, I am far more troubled by the rhetoric of the Extra-Legal Measures model than by its substantive legal and political content. Perhaps the survival rule *is* too restrictive in an age in which, as both Ackerman and Gross himself point out, genuinely existential threats are extremely unlikely.[70] Perhaps executive officials *should* be able to act extralegally whenever such action can be justified by a utilitarian calculus. If so, Gross should make that argument openly and honestly, instead of implying—more than a little disingenuously—that he is simply following the time honored survival rule. After all, the Extra-Legal Measures model requires officials who act extralegally to throw themselves at the mercy of the general public by "openly [and publicly] acknowl-

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[64] *Id.* at 1100.

[65] *See id.* at 1122 (noting that executive may be "charged with . . . protecting the state's national security interests, even by acting extralegally").

[66] *Id.* at 1111.

[67] *Id.* (emphasis added).

[68] *Id.* at 1023.

[69] *See id.* at 1099 (noting public may act to retrospectively approve official's conduct).

[70] *See* Gross, *supra* note 58, at 1030 ("In most cases, terrorist groups and organizations . . . are no real physical or military match to well-organized states. The threats they pose are not existential in the sense that they do not put in real danger the very existence of the victim state."); *supra* note 38 and accompanying text.

edging [the nature of] their actions."[71] Should Gross not be held to the same standard in the marketplace of ideas?

II. "GREAT" PRESIDENTS

The fact that both Paulsen and Gross feel it necessary to honor the survival rule, if only in the breach,[72] indicates that the rule is a sensible—though certainly contestable—dividing line between legitimate and illegitimate extraconstitutional action. For all the reasons Madison, Lincoln, and the others have articulated,[73] if Presidents should be empowered to disregard the Constitution in times of crisis, it makes sense to insist that the crisis fundamentally threaten the constitutional order itself.

Does the survival rule provide the leverage point for which Professor Levinson is looking? As we have seen, it allows us to distinguish between Lincoln's suspension of habeas corpus and Bush's authorization of torture. But what about all of the other arguably extraconstitutional actions taken by "great" Presidents like Jefferson and Roosevelt? Does embracing the survival rule invalidate—if only counterfactually—their "happy endings"?

To answer that question, we must first distinguish between endings that Professor Levinson considers happy and endings he considers tragic. Although he again avoids judging the various extraconstitutional acts he catalogues, I think we can reasonably infer that he believes only three qualify as genuinely happy: Jefferson's Louisiana Purchase,[74] Lincoln's Emancipation Proclamation,[75] and Roosevelt's lend-lease program.[76]

Although the actual necessity of all three actions is open to debate, the Emancipation Proclamation seems the least likely to be invalidated by the survival rule. As Professor Levinson notes elsewhere, "There can be little doubt that Lincoln believed that

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[71] Gross, *supra* note 58, at 1099.

[72] To paraphrase Hamlet, of course. *See* WILLIAM SHAKESPEARE, HAMLET act I, sc. 4 ("[I]t is a custom/More honour'd in the breach than the observance.").

[73] *See supra* notes 27-31 and accompanying text.

[74] *See* Levinson, *supra* note 3, at 736.

[75] *Id.* at 701.

[76] *Id.* at 736.

Emancipation was as functional to winning the War, and thus maintaining the Union, as suspension of habeas corpus had been."[77] Indeed, Lincoln said that "it was a military necessity, absolutely essential for the salvation of the nation, that we must free the slaves or be ourselves subdued."[78] It is impossible to know, of course, whether Lincoln was right; the North may have won the Civil War even if he had not issued the Proclamation. Given the real threat to the Union, however, Lincoln clearly deserves the benefit of the doubt.

Whether the survival rule would likely justify Roosevelt's highly effective[79] lend-lease program is a closer question. If we apply the rule very narrowly, limiting it to "imminent" existential crises such as complete nuclear annihilation, the lend-lease program would probably not qualify: Even a unified Nazi Europe would not have immediately attacked the United States. Still, at least one historian has argued that such an attack was Hitler's ultimate desire,[80] and that desire would have been much easier to realize with Europe (and Northwest Africa) under Nazi control. The lend-lease program might thus be justified by a slightly broader interpretation of the survival rule, one that does not require the President to wait for an actual or imminent attack as long as, in the absence of extraconstitutional action, the enemy would most likely acquire the means to pose an existential threat to the country.[81]

The Louisiana Purchase, by contrast, would almost certainly be invalidated by the survival rule. Although he knew the Purchase was likely unconstitutional, Jefferson insisted, as noted earlier, that

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[77] Sanford Levinson, *Abraham Lincoln, Benjamin Curtis and the Importance of Constitutional Fidelity*, 4 GREEN BAG 2d 419, 425 (2001).

[78] JAMES FORD RHODES, HISTORY OF THE CIVIL WAR, 1861-1865, at 152 (E.B. Long ed., Frederick Ungar Publishing Co. 1961) (1917).

[79] *See* Konstantin Rozhnov, *Who Won World War II?*, BBC NEWS, May 5, 2005, http://news.bbc.co.uk/1/hi/world/europe/4508901.stm (stating that Joachim von Ribbentrop believed that Roosevelt's program was one of three main reasons Germany lost war).

[80] *See generally* NORMAN J.W. GODA, TOMORROW THE WORLD: HITLER, NORTHWEST AFRICA, AND THE PATH TOWARD AMERICA (1998) (discussing Hitler's military strategies as forming basis for intended future war against United States).

[81] This argument—which is debatable, of course—is still different from Paulsen's nuclear strike hypothetical, even though both in some sense involve a "pre-emptive" attack. As noted earlier, a nuclear strike on an American city could not possibly pose an existential threat. *See supra* note 38 and accompanying text. A Nazi invasion of the United States could have.

"[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation" than "strict observance of the written law."[82] Nevertheless, Professor Levinson himself points out that "[e]ven if one agrees with Jefferson, it remains well worth asking precisely how salvation of the country required the Purchase."[83] Failing to take advantage of Napoleon's offer may have strengthened Spain's position vis-à-vis the United States,[84] but the country would have survived.

There is no question, then, that the survival rule has its costs. If the rule had been in place—and enforced—since the founding of the Republic, Jefferson would not have made the Louisiana Purchase and Roosevelt's lend-lease program might have been a nonstarter. But is that reason enough to reject the survival rule? Would reading the Constitution to permit extraconstitutional action only in times of existential crisis make it, to quote Professor Levinson, such "a barrier to public happiness" that it would be foolish to "build our civil religion around" it?[85]

There is no easy answer to that question. It is impossible to know whether the survival rule would prevent a future President from taking an action that, though perhaps not strictly necessary to save the constitutional order, would lead to a happy ending on par with the Louisiana Purchase. That is why the connection Professor Levinson makes between limits on extraconstitutional action and the legacies of our "great" Presidents is so important: The only way to decide whether a particular rule makes sense *ex ante* is to examine its effects *ex post*.

Such an analysis, however, requires us to consider *all* of the extraconstitutional actions presidents have taken in the name of "necessity," even if—as Professor Levinson rightly insists—our decision to label a particular action as "happy" or "tragic" will necessarily be a function of our own fundamental political visions.[86]

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[82] *See supra* note 28 and accompanying text.

[83] Sanford Levinson, *Why the Canon Should Be Expanded to Include* The Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 255 (2000).

[84] *See id.* at 254 n.43 (noting that territory "retroceded from Spain to France" on Nov. 30, 1803 and then was "transferred to the United States" on Dec. 20, 1803).

[85] Levinson, *supra* note 3, at 735.

[86] *See id.* at 736 ("Can one possibly decide whether to condemn either of these distinguished Presidents without taking a political stand on the merits of the Purchase or the

If we overvalue the happy endings or undervalue the tragic ones, we will be too willing to expand presidential power; if we overvalue the unhappy endings or undervalue the happy ones, we will be too willing to restrict it.

Unfortunately, I think Professor Levinson's essay falls into the former category, which is why he is so concerned that he will undo the work of great democrats like Jefferson and Lincoln if he criticizes Bush's extraconstitutional actions. Most illuminating in this regard is his decision not to discuss *Korematsu*[87] and *Steel Seizure*[88] for lack of time.[89] Notice the placement of the sentence. It comes immediately after Levinson points out that "it is difficult to understand why we would build our civil religion around a constitution that seems to operate as a barrier to public happiness,"[90] and immediately before he writes that neither incident resolves the issue of "our willingness, whether as a voting public or adjudicating judges, to accept the presence of 'emergencies' as a justification for deviation from ordinary constitutional norms."[91] *Resolves*, no. But would not a more detailed discussion of how Roosevelt and Truman blatantly misused their extraconstitutional authority *influence* our willingness to give them that authority? And would not knowing that extraconstitutional action has led to just as many tragic endings as happy ones—if not more—affect whether we do, in fact, see the Constitution as "a barrier to public happiness"?

The most significant cost of focusing only on happy endings, though, is that it feeds into the very pathology that Professor Levinson identifies: namely, our tendency to distinguish between better and worse *presidents*, not between better and worse *presidential actions*. It is that tendency, I believe, that makes us wary of

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preservation of the Union?").

[87] Korematsu v. United States, 323 U.S. 214, 215-18 (1944) (upholding detention of Japanese-Americans during World War II as Constitutional under war powers of Congress and President).

[88] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 582 (1952) (invalidating President Truman's seizure of nation's steel mills during Korean War).

[89] *See* Levinson, *supra* note 3, at 735 ("If I had more time I could certainly look at other important cases and discussions.").

[90] *Id.*

[91] *Id.*

embracing any rule of necessity that might invalidate the legacy of a "great" President. As Professor Levinson writes:

> If it becomes almost literally unthinkable, for example, to accept descriptions of Abraham Lincoln or Franklin Roosevelt, widely accepted as two of our three unequivocally greatest presidents, as quite cavalier at times with regard to legal norms that might have constrained their doing what they viewed as best for the country, then, as cognitive dissonance theory would predict, we redefine the law rather than redefine the presidents.[92]

Cognitive dissonance, however, is not a static phenomenon; its magnitude depends on the *ratio* of dissonant to consonant cognitions.[93] The rationalizing effect of cognitive dissonance exists, therefore, primarily because a President's legacy tends to be determined by one particularly salient heroic or tragic action; that narrow focus means a single counter example will create significant cognitive dissonance. If a President's legacy was determined by *all* of his actions—both heroic *and* tragic—one counterexample could not have much effect either way.

Consider, for example, Lincoln's legacy. If all we know about the "great" President Lincoln is that he heroically (if unconstitutionally) freed the slaves, learning that he far less heroically (and equally unconstitutionally) ordered the summary arrest of individuals engaged in "disloyal and treasonable" practices[94] will create significant dissonance and tempt us to "redefine" the summary arrests as constitutional. That will not be the case, however, if we view Lincoln as a great President because he freed the slaves *even though* we know that he also unconstitutionally mobilized the

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[92] *Id.* at 703-04.

[93] *See, e.g.*, Eddie Harmon-Jones & Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory*, *in* EDDIE HARMON-JONES & JUDSON MILLS, COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY 1, 1-2 (1999). Formally, "the magnitude of dissonance equals the number of dissonant cognitions divided by the number of consonant cognitions plus the number of dissonant cognitions." *Id.*

[94] ROSSITER, *supra* note 6, at 228.

militia,[95] blockaded southern ports,[96] gave Treasury funds to favored private individuals,[97] and suspended habeas corpus.[98] With that more nuanced view of Lincoln's greatness, learning about the summary arrests will not create significant cognitive dissonance and will thus not tempt us as strongly to redefine the arrests (or any of his other admittedly unconstitutional actions) as constitutional.

Given the dynamics of cognitive dissonance, all constitutional scholars, conservative and liberal alike, have an interest in considering a President's extraconstitutional actions as a whole—not just those that accord with their views of his status as a great President, a not so great one, or worse. Without such balance, an adult conversation about the limits of presidential power is simply not possible.

To be fair, Professor Levinson's underemphasis on tragic endings clearly results from his desire to take the case for extraconstitutional power seriously. Other scholars, unfortunately, are less judicious. They also underemphasize tragic endings, but they do so intentionally—to *rationalize* the imperial presidency, not to *debate* it.

Once again, Paulsen is the prototypical example.[99] With the exception of an allusion to the *Steel Seizure Case*[100] and a brief discussion of *Korematsu*,[101] both of which I shall discuss in a moment, the only extraconstitutional actions mentioned in *The Constitution of Necessity* are those Lincoln took to preserve the Union during the Civil War[102]—the quintessential example of a

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[95] *Id.* at 225.

[96] *Id.* at 226.

[97] *Id.*

[98] *Id.* at 227.

[99] *See* Paulsen, *supra* note 39, at 1264-66. Gross also tries to defend his model—though far less brazenly than Paulsen—by invoking the legacies of great Presidents like Jefferson and Lincoln. *See* Gross, *supra* note 58, at 1110 (comparing Jefferson's "approach to emergency powers" with Lincoln's "assertion of special powers during the war"). Conveniently absent is any mention or discussion of tragic extraconstitutional actions, such as *Korematsu*, where Congress, the Court, and the public were all more than willing to ratify the President's evasion of the Constitution.

[100] *See* Paulsen, *supra* note 39, at 1271 & n.32 (noting issue of whether President has "writ-suspension power" presents a *Youngstown* "category II" situation).

[101] *See id.* at 1259 (noting that case stands for "[c]omplete congressional and judicial acquiescence or abdication").

[102] *See id.* at 1264-66 (discussing Lincoln's suspension of privilege of writ of habeas

happy constitutional ending. Indeed, Paulsen invokes Lincoln's legacy over and over again to justify his theory of presidential power. To mention only a few instances: "my thesis is not original—it was Lincoln's";[103] "[t]he need to preserve the Constitution—and accordingly, as Lincoln points out, the need to preserve the nation whose Constitution it is—operates as a rule of construction for other constitutional principles";[104] "[f]or some, this medicine is too strong. But as Lincoln put it in his 1863 letter to Corning, the fact that medicine might be poor food for a well man does not mean it is not good medicine for a sick one."[105] Then, of course, there is Paulsen's ultimate act of scholarly hubris, quoted by Professor Levinson:[106] "[I]f I am mistaken in all this, *so was President Lincoln.*"[107]

A number of points need to be made about Paulsen's attempt to convince us he is channeling Lincoln's ghost.[108] To begin with, the attempt is simply disingenuous: Paulsen's interpretation of "necessity" is far more expansive than anything Lincoln ever advocated. Lincoln explicitly embraced the survival rule; in his view, the President could only act extraconstitutionally in cases of "indispensable necessity"—when such action was necessary for "the preservation of the nation."[109] As we have seen, however, Paulsen's theory permits the President to ignore the Constitution whenever he believes that doing so will counter the nation's "self-destructive tendencies."[110]

Revealingly, Paulsen *knows* his rule of necessity is more permissive than Lincoln's. He not only acknowledges that Lincoln's

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corpus).

[103] *Id.* at 1260.

[104] *Id.* at 1268.

[105] *Id.* at 1280.

[106] Levinson, *supra* note 3, at 717.

[107] Paulsen, *supra* note 39, at 1297 (emphasis added).

[108] I write this only half facetiously. In his acknowledgment preceding his very first footnote, thanking scholars for comments on an earlier draft of his essay, Paulsen writes that "[n]one of these persons should be blamed for the ideas expressed here; Abraham Lincoln should." *Id.* at 1257.

[109] Letter from Abraham Lincoln, President of the United States, to Albert G. Hodges, U.S. Senator (April 4, 1864), *in* 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-65, at 585, 585 (Don E. Fehrenbacker ed., 1989).

[110] Paulsen, *supra* note 39, at 1260.

survival rule might not authorize "protection of the nation's people, in circumstances falling well short of a risk of complete destruction of the constitutional order"[111]—something of an understatement—he also admits that he would "probably" be willing to extend the rule even further.[112] We have no choice, then, but to interpret his claim that "if I am mistaken in all this, so was President Lincoln," as nothing more than a rhetorical move designed to provide his controversial ideas with a patina of authority they would not otherwise enjoy.

Equally enlightening are Paulsen's discussions of the *Steel Seizure Case* and *Korematsu*, two tragic endings that counsel against the kind of imperial presidency he endorses. He mentions both cases in order to discuss two supposed checks on the President's extraconstitutional power: the *Steel Seizure Case* indicates there must be a "close means-end fit of measure to compelling objective,"[113] and *Korematsu* demonstrates the need for Congress and the Court to avoid deferring to the President regarding "when 'necessity' really exists and what 'necessity' truly requires."[114]

Once again, however, this is nothing but empty rhetoric. The authority of Congress and the Court to "check" presidential power depends on specific provisions of the Constitution, and Paulsen makes it very clear that the President can suspend *any* constitutional provision, should "necessity" require it.[115] As he writes:

> [T]he rule of necessity is, when push comes to shove, a rule of constitutional priority. The first duty of the President of the United States is to preserve, protect, and defend the nation, through every indispensable means. That duty is both a precondition to and an

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[111] *Id.* at 1290 (emphasis omitted).

[112] *Id.* Which he does, of course, as his defense of enemy combatants and military tribunals demonstrates. *See supra* note 40 and accompanying text.

[113] Paulsen, *supra* note 39, at 1290.

[114] *Id.* at 1294.

[115] *See* Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877, 880 (2006) (noting, for example, that "Professor Paulsen has no conceptual resources with which to challenge a decision by the President, anticipating impeachment, to use his power as Commander in Chief as the basis for directing military officials to deploy troops to prevent Congress from meeting").

> essential aspect of the duty to preserve, protect, and defend the Constitution. The duty is superior to the duty to enforce *any* particular provision, where doing so would be in conflict with such a broader conception of constitutional duty.[116]

The similarity between this conception of the presidency and Carl Schmitt's conception of the sovereign dictator is unmistakable. Schmitt's sovereign dictator "decides whether there is an extreme emergency as well as what must be done to eliminate it."[117] Paulsen's President has the right to suspend any provision of the Constitution when he determines "necessity" requires it. The language may be different, but the idea is the same.

Given that Paulsen endorses what can only be described as a near-dictatorial conception of the presidency, we should not be surprised that he focuses almost exclusively on Lincoln's extraconstitutional actions during the Civil War. Lincoln was indeed a "greater democrat than dictator,"[118] but other Presidents—particularly the current one—have not always wielded their power so wisely. The more we focus on the tragic endings of *those* Presidents, therefore, the more inclined we will be to question theories that reduce the Constitution to little more than an advisory opinion.

III. CONCLUSION

I do not presume to believe that I have found the leverage point for which Professor Levinson has been looking. My objectives in this short Comment have been far more modest: to show that there is a widely accepted definition of necessity, the survival rule, that can distinguish between Lincoln's suspension of habeas corpus and Bush's authorization of torture; and to demonstrate that, if we value avoiding tragic endings as highly as permitting happy ones, the *ex*

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[116] Paulsen, *supra* note 39, at 1282 (emphasis omitted and added).
[117] SCHMITT, *supra* note 31, at 6-7.
[118] ROSSITER, *supra* note 6, at 224.

post case for applying the survival rule *ex ante* is stronger than Professor Levinson might imagine.

Even if we agree to embrace the survival rule, however, the heavy intellectual lifting remains. In particular, two practical questions need to be answered. First, should the scope of the President's authority to act extraconstitutionally in times of crisis be defined by law, whether through a constitutional amendment, as Scheuerman advocates,[119] or through carefully drafted congressional statutes, as Rossiter believes?[120] Or would it be better to leave that authority undefined but guaranteed through a rule of constitutional priority, as Paulsen suggests?[121]

Second, which branch of government should decide whether the President can invoke the survival rule? Should the President himself have the final say, as Schmitt[122] and Paulsen[123] argue? Or is that a recipe for dictatorship, as Rossiter suggests, so Congress should be required to authorize a President's invocation of the survival rule?[124] Or, finally, are the courts best situated in times of crisis to determine the limits of the President's power, as David Cole maintains?[125]

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[119] William E. Scheuerman, *Time to Look Abroad? The Legal Regulation of Emergency Powers*, 40 GA. L. REV. 863, 875 (2006) (arguing that only such constitutional emergency clauses "can provide necessary prospective or *ex ante* legal guidelines, help create a clear separation of emergency from ordinary lawmaking, and outline strict legal requirements whereby we could better distinguish legal from illegal emergency government").

[120] *See* ROSSITER, *supra* note 6, at 310-12 (outlining six proposals for how such statutes should be drafted).

[121] *See* Paulsen, *supra* note 39, at 1282 (describing rule of constitutional priority as one where "preserving the Constitution as a whole . . . must, in the event of conflict, take precedence over strict adherence to specific parts of that Constitution").

[122] SCHMITT, *supra* note 31, at 12.

[123] *See* Paulsen, *supra* note 39, at 1296. Paulsen also wrote:

> If a President concludes that the survival of the nation or its people depends on a course of action that is indispensably necessary to avert such a disaster, his duty as President—his duty *to the Constitution*—requires that he not let a judicial decision to the contrary prevent him from performing what his duty requires.

Id.

[124] ROSSITER, *supra* note 6, at 299 (suggesting that "the President should have a provisional power of declaring national emergencies; Congress, however, should have the final decision").

[125] David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2591 (2003) (noting that, in making such decisions, "[t]he courts are undoubtedly highly imperfect; but the alternatives are worse").

A complete answer to either question is well beyond the scope of this Comment. Nevertheless, I think my analysis of Paulsen's and Gross's attempts to justify a conception of presidential and executive power that goes far beyond the survival rule yields a few useful suggestions.

To begin with, it is clear that the survival rule should be instantiated in law, whether by statute or by constitutional amendment, not left floating in the Paulsenian ether. Without some sort of textual commitment to the survival rule, Presidents will be able to advocate rules that are far less restrictive—"self-destructive tendencies," "the greatest good for the greatest number"—whenever it seems politically expedient to do so.[126] Such appeals will find willing listeners in times of crisis, whether real or imagined; as Gross himself points out, "when faced with serious terrorist threats or with extreme emergencies, the general public and its leaders are unlikely to be able to assess accurately the risks facing the nation."[127] A textual commitment to the survival rule, therefore, would make it easier for the reviewing branch to resist popular pressures to let the President do whatever he thinks is necessary to "protect" the country from harm.

It is also clear that, even with the survival rule in place, the President should not have unreviewable authority to determine whether an existential crisis exists (or, for that matter, to determine what extraconstitutional actions are necessary to defuse it). It is no accident that Paulsen uses Lincoln—and only Lincoln—to defend his near-dictatorial conception of presidential power: If every President were as great as Honest Abe, such power would not be so problematic.

The real question, then, is whether Congress or the courts should be empowered to review a President's invocation of the survival rule. Instructive in this regard is Gross's Extra-Legal Measures model, which holds that all executive officials should have the power to act extralegally, subject only to the *ex post* ratification of the people via

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[126] *Cf.* Ackerman, *supra* note 38, at 1060 (noting that "clear and present danger" test "generates unacceptable risks of political manipulation").

[127] Gross, *supra* note 58, at 1038.

their elected representatives in Congress.[128] According to Gross, requiring officials to "throw oneself on one's country" in this way will deter them from abusing their power because they will face legal and political consequences—impeachment, civil sanctions, criminal prosecution—if they guess wrong and Congress refuses to ratify their extralegal actions.[129]

Though elegant, Gross's model would be a disaster in practice. As noted above, Gross himself admits that the public and their elected representatives tend to overreact in times of crisis. It is thus highly unlikely that Congress would be willing to punish an executive official for violating the survival rule, as long as his extralegal actions were in some measure designed to protect the public from harm.[130] After all, Gross and Paulsen are both willing to countenance torture in situations that do not involve an existential threat, despite the fact that they both claim to embrace the survival rule. Do we really believe that the average congressperson will be any more discriminating?

Congress, moreover, has not exactly distinguished itself in terms of executive oversight. As Cole writes:

> Its overwhelming approval of the Smith Act and the Internal Security Act during the McCarthy era and of the Antiterrorism and Effective Death Penalty Act and the Patriot Act in the current era, coupled with its appropriation of funds for the Japanese internment in World War II, illustrate that legislators are exceedingly unlikely to stand up against executive power in the name of civil liberties during emergencies.[131]

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[128] *Id.* at 1099.

[129] *Id.* at 1124-25.

[130] Cole, *supra* note 125, at 2590 (noting that executive officials whose actions are held unconstitutional are already potentially subject to punishment, yet "the likelihood that criminal or civil sanctions will be imposed is, in fact, virtually nil").

[131] *Id.* at 2591-92 (citations omitted).

Such deference is particularly likely, of course, when—as is the situation today with the Bush Administration—the executive and legislative branches are both controlled by the same party.[132]

In the end, then, only the courts remain a viable option. Unlike Congress, the judiciary has no structural incentive—the need to win reelection or maintain party discipline—that would prevent it from enforcing the survival rule narrowly and consistently.[133] To be sure, "[j]udges, like the general public and its political leaders, 'like to win wars" and are sensitive to the criticism that they impede the war effort."[134] As Cole points out, however, "the alternatives are worse."[135]

Again, these thoughts, like the Comment itself, are merely provisional—my attempt to contribute to the adult dialogue Professor Levinson wants us to have about the proper balance between presidential power and constitutional restraints. I confess that I am not encouraged by the conversation thus far; those who defend an expansive interpretation of the President's authority to act extraconstitutionally seem less interested in balance than in rationalizing the imperial presidency. I remain optimistic, however, that future dialogue will be more productive; given the stakes of the debate, we will all be the losers if we remain like Pinter's Len and Mark, one side talking about God, the other about biscuits.

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[132] *See* ROSSITER, *supra* note 6, at 299 ("In such instances it is hardly practicable to look to the legislature for an independent decision that emergency powers be called into action, or for an independent check upon their employment."); *cf.* Levinson, *supra* note 3, at 746 (noting that Congress may not provide "built-in institutional check against presidential aggrandizement," because "loyalties to one's political party may well take precedence over the presumed institutional interests of the House and Senate").

[133] *See* Cole, *supra* note 125, at 2575-77 (discussing five reasons, including political independence, why judiciary is especially suited to role of constraining emergency powers).

[134] Gross, *supra* note 58, at 1034 (citation omitted).

[135] Cole, *supra* note 125, at 2591.